Supreme Court, U.S.
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No. 99-52

IN THE

Supreme Court of the United States

HERB HALLMAN CHEVROLET, et. al.,

Petitioners,

–against–

DOROTHY NASH-HOLMES, et. al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. THE LAW RELATING TO PROSECUTORIAL IMMUNITY IS NEITHER CLEAR NOR UNAMBIGUOUS

Defendant's Brief in Opposition reiterates the disputed factual claims made by the defendants in the courts below but does not squarely confront the questions posed by the Petition -- questions relating to when a prosecutor charged with violating an individual's civil rights is absolutely immune from suit under the civil rights statutes, and to the delicate relationship between state and federal courts in the criminal justice and civil rights arena.

Defendants assert that "it is the clear and unambiguous law of the land" that prosecutors have absolute immunity for any actions they take in presenting evidence to a grand jury. (Brief in Opposition at 8) But whether that proposition, in fact, is the "law of the land" is far from clear.

In Buckley v. Fitzsimmons, 509 U.S. 259, 274 (1993), this Court stated that a prosecutor does not enjoy absolute immunity before "there is probable cause to have anyone arrested." The Court did not say, as the defendants seem to believe, that once a prosecutor convenes a grand jury, he immediately is cloaked with absolute immunity. Indeed, the prosecutor in Buckley presented fabricated evidence to a grand jury, but, nevertheless, was not held to be protected by absolute immunity.

Buckley established that, because the grand jury serves several functions, a prosecutor appearing before an investigative grand jury may be functioning not as an advocate, but as an investigator. For example, a prosecutor concerned about corruption in the police department might convene an investigative grand jury to determine if any crimes have been committed. If this Court's pronouncement in Buckley means what it seems to mean, then that prosecutor's actions before that

investigative grand jury would not necessarily be cloaked with absolute immunity (although the prosecutor might still be protected by qualified immunity), if the prosecutor did not have probable cause to have anyone arrested while he was employing the grand jury as an investigative tool. And that would seem to be true even if the grand jury later issued indictments.

In short, despite defendants' contention to the contrary, the law as it relates to prosecutorial immunity is not "clear and unambiguous," particularly as it applies in this case. Here, there was a year long investigation by the police but no arrests were made. When Deputy District Attorney Donald Coppa finally convened a grand jury, he did not identify for the grand jurors any particular crimes that had been committed by the suspects. Instead, he began each session by announcing that the grand jury's function was to "investigate" the dealership's business practices. The state court expressly found that the grand jury was acting in an investigative function. Nevertheless, the Ninth Circuit, adopting the defendants' position, created a bright line test, holding that all of the prosecutor's conduct after convening the grand jury was protected by absolute immunity. Whether Buckley sanctions such a bright line test is a question this Court should decide.

The defendants also misapprehend the serious and complex questions posed by the federal court's disregard of the state court opinion. That opinion found repeated, gross improprieties committed by the prosecutor before an investigative grand jury. The state court also accepted the representations of a Deputy District Attorney that there was not even "slight or marginal evidence" to support any of the charges against Stanko and the dealership, and dismissed those charges, and found that there was insufficient evidence to support the remaining counts against the remaining defendants. Based on all of its findings, the state court dismissed the indictment with prejudice.

The question presented for this Court is not, as defendants suggest, whether "estoppel" technically precluded the federal courts from revisiting these issues. The question is whether, as a matter of comity, the federal courts should give some degree of deference to state court rulings which establish the absence of probable cause to support an arrest.

Finally, the Brief in Opposition does not even mention one of the related questions posed in this Petition: that is, whether a federal court can bestow absolute immunity on a prosecutor by "finding" that the prosecutor had probable cause to arrest an individual, not for the crimes spelled out in the arrest warrant, but for some other unspecified, unidentified crime. The Ninth Circuit opined that the prosecutors had probable cause to arrest some of the dealership's salesmen for something -- although the Court never said what. Consequently, according to the Ninth Circuit, the prosecutors were acting as "advocates" under Buckley and were entitled to absolute immunity.

The defendants have not attempted to defend the Ninth Circuit's creation of "probable cause in the abstract." Whether such a concept is consistent with the Constitution is itself a difficult question that this Court should resolve.

II. PETITIONERS PROPERLY RAISED THEIR SECOND QUESTION IN THE COURT BELOW

Defendants argue that certiorari should be denied on the second question posed in the Petition because it was not raised before the Ninth Circuit. That is not true. Throughout their Brief to the Ninth Circuit, petitioners argued that the standard federal rules governing summary judgment should apply to the defendants' motions for summary judgment on immunity grounds, and that all disputed issues of fact should be resolved in their favor, and the record read in the light most favorable to the plaintiffs.

The Ninth Circuit, while paying lip service to this standard, simply ignored it, resolving virtually every factual dispute in favor of the defendants, and reading the record in the light most favorable to the defendants.

This Petition asks this Court to squarely address what the Ninth Circuit's decision implies -- whether there are special circumstances when state officials raise immunity defenses that alter the traditional rules that apply to summary judgment. If, in fact, the traditional rules are not to be followed in civil right cases, then this Court should also consider whether the Seventh Amendment right to a jury trial is violated if summary judgment is granted despite the existence of material, disputed facts. These questions have been preserved for this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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